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IN THE

# Supreme Court of the United States

**October Term, 1972**

**Nos. 72-269, 72-270, 72-271**

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

*Appellants,*

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

*Appellees;*

EARL W. BRYDGES, as Majority Leader and President pro tem of the New York State Senate,

*Appellant,*

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

*Appellees;*

CATHEDRAL ACADEMY *et al.*,

*Appellants,*

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF for APPELLANTS CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL and BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL

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Appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School appeal from the judgment of the United States District Court for the Southern District of New York entered on June 1, 1972, permanently enjoining enforcement of Chapter 138 of the 1970 Laws of New York [hereinafter "Mandated Services Act"] which provides for the reimbursement of nonpublic schools for expenses incurred by them in complying with state requirements relating to the maintenance of attendance, health and personnel records, and the administration of tests and examinations.

## Opinions Below

The opinion of the majority of the District Court holding the Mandated Services Act to be violative of the Establishment Clause of the First Amendment and the dissenting opinion are reported at 342 F. Supp. 439 *et seq.* Copies of both opinions are also set forth in the Appendix to the Jurisdictional Statement of Appellants Cathedral Academy *et al.* [hereinafter "JS Appendix"] at pages 1a and 14a, respectively. An earlier opinion granting plaintiffs' motion to convene a three-judge district court is reported at 322 F. Supp. 678.

## Jurisdiction

This action was commenced pursuant to 28 U.S.C. §§ 1343(3) and 2281, 2284 to enjoin the enforcement of the Mandated Services Act as allegedly being in violation of the Establishment and Free Exercise Clauses of the

First Amendment. The final judgment of the District Court was entered on June 1, 1972. JS Appendix, pp. 18a-19a. A notice of appeal was filed on behalf of appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School on June 30, 1972. On November 6, 1972, this Court noted probable jurisdiction. Appendix, pp. 120a-121a.

This Court has jurisdiction to review the judgment of the District Court by direct appeal under 28 U.S.C. §§ 1253 and 2101(b). The most recent cases sustaining the jurisdiction of this Court to review the judgment in this case on direct appeal are *Lemon* v. *Kurtzman, Earley* v. *DiCenso* and *Robinson* v. *DiCenso*, 403 U.S. 602 (1971), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

## Constitutional Provision and Statute Involved

The First Amendment reads, in pertinent part, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

The statute involved is Chapter 138 of the 1970 Laws of New York, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor," the full text of which is set forth both in the Appendix to this brief and in the JS Appendix, commencing at page 26a.

## Question Presented

Whether the Mandated Services Act, which reimburses religiously-affiliated and other nonpublic schools for the record keeping, reporting and other administrative and evaluative services which they are required to perform under the New York Education Law, violates the Establishment Clause of the First Amendment.

## Statement of the Case

The Mandated Services Act was enacted by the New York Legislature to provide partial reimbursement to nonpublic schools for the expenses they incur in providing the numerous services relating to examination and inspection required by state law. Under the Act, nonpublic schools are reimbursed in the amounts of 15 cents per day per pupil in grades 1-6 (or $27 per year) and 25 cents per day per pupil in grades 7-12 (or $45 per year). Studies conducted under the auspices of the New York State Education Department, which by stipulation "may be taken as accepted facts for the purposes of this case",[1] show that these amounts are substantially less than the expenses actually incurred by the schools.

Appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School are nonpublic elementary or secondary schools situated in New York, and, until entry of the District Court's permanent injunction, were recipients of payments pursuant to the Mandated Services Act. They are affiliated with the Roman Catholic Church.

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[1] Appendix, p. 91a.

Plaintiffs instituted this suit in the United States District Court for the Southern District of New York against Nelson A. Rockefeller, Arthur Levitt and Ewald B. Nyquist in their respective capacities as Governor, Comptroller and Commissioner of Education of the State of New York, demanding that defendants be permanently enjoined from approving or paying any funds of the State of New York pursuant to the Mandated Services Act to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith. *See* Appendix, p. 15a.

Judge Morris E. Lasker granted a motion to intervene as parties defendant by appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School and by Bais Yaakov Academy for Girls and Yeshivah Rambam. Judge Lasker subsequently granted defendant Rockefeller's motion to dismiss the complaint as to him but denied defendants' motion to dismiss in all other respects and ruled that the complaint raised a substantial federal constitutional question. *See Committee for Public Education & Religious Liberty* v. *Rockefeller*, 322 F. Supp. 678 (S.D.N.Y. 1971). A three-judge district court, consisting of Judge Lasker, the Hon. Paul R. Hays, U. S. Circuit Judge and the Hon. Edmund L. Palmieri, U. S. District Judge, was duly constituted on February 24, 1971. A hearing on the merits was held on April 11, 1972.

On April 27, 1972, Judge Lasker handed down an opinion, concurred in by Judge Hays, that the Mandated Services Act violates the Establishment Clause of the First Amendment. The opinion reads, in part, as follows:

> . . . Either the statute falls because a system of surveillance and control would create excessive entangle-

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> ment, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen. 342 F. Supp. at 444; JS Appendix, p. 11a.

Judge Palmieri dissented, stating that, in his opinion, the Mandated Services Act is

> a legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. 342 F.Supp. at 445; JS Appendix, pp. 14a-15a.

On June 1, 1972, the judgment appealed from herein was entered, permanently enjoining defendants Levitt and Nyquist "and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools." JS Appendix, p. 19a.

Appellants Levitt and Nyquist, as well as the appellant schools, appealed from the District Court's final judgment. Docket No. 72-269.[2] Motions for a stay of the injunction pending appeal were denied by the District Court[3] and by Mr. Justice Blackmun. This Court's order of November 6, 1962, noting probable jurisdiction, consolidated all three appeals.

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[2] An appeal was also taken by Senator Earl W. Brydges, who was permitted by the District Court to intervene as a defendant by reason of his position as Majority Leader and President pro tem of the New York State Senate. Docket No. 72-270.

[3] Judge Palmieri, dissenting.

## Summary of Argument

The Mandated Services Act, which is unlike any other statute in the United States, reflects the close supervision which the State of New York has historically exercised pursuant to the compulsory education laws over the education of children in nonpublic schools. There is no unconstitutional involvement or entanglement with religion in New York's efforts to supervise the education of all children and in its effort to partially reimburse nonpublic schools for expenses they incur in meeting state-mandated requirements.

The public and nonpublic schools in the State of New York have long comprised a single system of education under the jurisdiction of the Board of Regents and the Commissioner of Education, who are empowered and required to ensure that all the schools in the system give their pupils an adequate education along the lines laid down by statute and by the regulations of the Commissioner. The broad extent to which nonpublic schools in New York are regulated and supervised by state authority was noted by this Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

The compulsory education statute (N.Y. Educ. Law § 3204) requires all children to attend full-time instruction "at a public school or *elsewhere.*" If "elsewhere," the instruction given must be *"at least substantially equivalent"* to that given in the public schools of the district where the child resides. To ensure this, statutes and regulations impose a long list of detailed requirements upon nonpublic schools in such fields as attendance, curricula, accredita-

tion, examinations and diplomas. The Regents and the Commissioner have traditionally had the broadest powers of visitation and inspection. Thus, whatever involvement exists between the state and nonpublic schools is due to, and has been carried out as a result of, long-established procedures under the compulsory education laws, *not* the enactment of the Mandated Services Act.

The lead opinion in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), states that a statute cannot be declared unconstitutional on the basis of a "hypothetical profile", and this Court in *Allen* specifically refused to assume that the religious element in the parochial elementary and secondary schools of the State of New York necessarily permeates the education that they provide. The record in this case (in the form of answers to interrogatories) shows that appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School are all affiliated with the Roman Catholic Church, but that none of these three Catholic schools is an integral part of the religious mission of the Church. All are an integral part of the communities in which they are located. Their principal function is education. They do not impose religious restrictions on pupil admissions or on faculty appointments. They do not require their pupils to attend religious activities or to adhere to a particular faith.

The record in this case does not support the conclusion of the majority below that the Mandated Services Act entails excessive entanglement between church and state. No auditing of the books of nonpublic schools is necessary or required because the amounts reimbursed are fixed at levels far below the actual cost of the services involved, as deter-

mined by state education officials. The Act has not given rise to a "comprehensive, discriminating, and continuing state of surveillance". It does not present the potential for excessive involvement or entanglement which led this Court to strike down the teachers' salary supplement statutes in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). First, the services mandated are administrative and noninstructional, such as the maintenance of attendance and health records and the administration of examinations. Second, the requirement for these services originated with the state, long antedated the Act and is intended to benefit the state as the regulating agency and the child whose education is involved, rather than the nonpublic schools which are required to perform these administrative services as a convenience to the state. Third, the costs incurred in providing these services were properly determined by legislative procedures and are substantially below the amount allocated for these same services in public schools. Fourth, the money apportioned pursuant to the Mandated Services Act is done so retroactively, as partial reimbursement for services already rendered, rather than as an advance payment.

The record in this case also does not support the speculation of the majority below with respect to potential divisive political activity. Both the history of the Mandated Services Act and the history of nonpublic education in the State of New York, in general, show a remarkable lack of political divisiveness. The Mandated Services Act received bipartisan support and there has not been any annual legislative appropriation dispute over the Act. Indeed, it is unlikely that such discord could erupt in view of the Act's limited scope and restricted, precise formulas.

## ARGUMENT

### THE MANDATED SERVICES ACT HAS A SECULAR PURPOSE AND PRIMARY EFFECT; IT DOES NOT CHANGE THE LONG-STANDING RELATIONSHIP BETWEEN THE STATE AND NONPUBLIC SCHOOLS UNDER WHICH THE STATE CLOSELY SUPERVISES THE EDUCATION OFFERED BY SUCH SCHOOLS

In *Lemon* v. *Kurtzman*, this Court summarized the tests applicable to a determination of constitutionality under the Establishment Clause:

> . . . Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion" . . . 403 U.S. at 612-13.

None of the three judges in the District Court found that the Mandated Services Act has a sectarian purpose or that its principal or primary effect is the advancement of religion.[4] The decision of the majority of the District Court was based on a conclusion that the Act was unconstitutional for entanglement reasons, a point which we discuss below.

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[4] The Mandated Services Act had been fully enforced for the better part of two school years before the District Court was called upon to act upon appellees' claim(s) for relief, and the court therefore had more than appellees' hypotheses about the Act upon which to gauge the tests with respect to the Act's purpose and effects.

**The Purpose of the Mandated Services Act Is Wholly Secular**

The Mandated Services Act was based upon a legislative finding that:

> . . . the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.
>
> That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.
>
> That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.
>
> Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

Judge Lasker stated in his opinion granting the motion to convene the three-judge District Court below that:

> We may admit that the statute's purpose is not offensive. The objectives of assuming that New York's

> "precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century" is beyond question a worthy and legitimate legislative concern.[5]

The purpose of the Mandated Services Act, as shown by the legislative preamble, was to implement the state's long-standing policy of requiring nonpublic schools to be conducted on a basis substantially comparable to that of the public schools with respect to the non-religious aspects of their operations. The Legislature recognized that the state had imposed upon nonpublic schools certain requirements as to curricula, attendance, examination and testing, and record-keeping and that it was only fair that the state should compensate these schools for the expenses incurred in meeting these state-mandated obligations. This does not advance religion in any conceivable way. It does not intrude into the instructional or educational process. It simply requires the state to pay part of the administrative expenses mandated by law.

The New York Legislature has clearly set forth the purpose of the Mandated Services Act, and it readily reflects the state's continuing, legitimate concern for maintaining minimum standards in all schools which educate New York children. This concern on the part of New York has already found constitutional acceptance in *Allen*. In holding the New York Textbook Loan Act constitutional in *Allen*, this Court stated:

> . . . [I]f the State must satisfy its interest in secular education through the instrument of private schools,

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[5] *Committee for Public Education & Religious Liberty* v. *Rockefeller*, 322 F. Supp. 678, 683 (S.D.N.Y. 1971).

it has a proper interest in the manner in which those schools perform their secular educational function. 392 U.S. at 247.

**The Principal or Primary Effect of the Mandated Services Act Is Neither to Inhibit Nor Advance Religion; It Is to Assure that All School Children in the State Are Receiving Instruction as Required by Law and Are Maintaining Acceptable Levels of Achievement**

New York cannot require all children to attend public schools. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). On the other hand, the state properly can and does require that the instruction given children attending nonpublic schools must be "at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools". As described below at pages 17 to 24, it has enacted various statutes and promulgated numerous regulations to assure that minimum standards of education are maintained. The Mandated Services Act reimburses nonpublic schools for the expenses incurred in assuring compliance with such regulations and requirements.[6] The principal or primary effect of the Mandated Services Act therefore is the assurance that work entailed in the keeping of records and testing considered necessary by the

[6] The funds provided to nonpublic schools under the Mandated Services Act represent a very small fraction of the budgets of the schools, the great bulk of which budgets is necessarily used in providing the education which these schools are legally required to give. Indeed, Judge Lasker stated on the record that the sums involved under the Act seemed to him to be "so small". Transcript of Proceedings of June 20, 1972, p. 13, Doc. No. 45, Record on Appeal.

state is, in fact, done in a proper manner. Any benefit to the schools is incidental to the carrying out of the state's regulatory functions.

The crucial question with respect to the effect of a statute in a case such as this "is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether its *principal or primary effect* advances religion." *Tilton* v. *Richardson,* 403 U.S. at 679 (emphasis added).

In *Tilton,* a majority of this Court concluded that the construction of certain buildings on the campuses of four Catholic colleges in Connecticut with the aid of public funds did not have as its principal or primary effect the advancement of religion. Similarly, this Court concluded in *Allen* that the primary effect of the New York Textbook Loan Act neither advanced nor inhibited religion. *See* 392 U.S. at 243. *See also Walz* v. *Tax Commission of the City of New York,* 397 U.S. 664, 672 (1970). This Court reached similar conclusions with respect to Maryland's Sunday closing laws [*see McGowan* v. *Maryland,* 366 U.S. 420 (1961)] and the New Jersey bus transportation statute upheld in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). Indeed, even in the *Lemon* v. *Kurtzman* and *DiCenso* cases where this Court concluded that the Pennsylvania and Rhode Island statutes were constitutionally unacceptable, that conclusion was not based upon any determination that the principal or primary effect of those statutes was the advancement of religion. In fact, the District Court in *Lemon* v. *Kurtzman* had specifically found that the primary effect of the Pennsylvania statute was not the advancement of religion. *See* 310 F.Supp. at 46.

In his opinion in *Tilton,* Chief Justice Burger stated:

> The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield* v. *Roberts,* 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid those institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. 403 U.S. at 679.

If, as indicated in these cases, public funds may be used constitutionally for the reimbursement of expenses not required by state law to be incurred by nonpublic schools or parents, such as bus transportation, buildings or textbooks, it would be wholly incongruous to outlaw the use of state funds for the reimbursement of expenses caused by requirements imposed by state law. If the principal or primary effect of the provision of public funds for the construction of school buildings, the payment of bus transportation and the purchase of textbooks is not the advancement of religion (none of these being publicly mandated by law), then it is inconceivable that the principal or primary effect of the provision of public funds for reimbursement of the expenses of publicly-mandated services such as maintenance of attendance and other records could be the advancement of religion.

**Nonpublic Schools Have Long Been an Integral Part of Education in New York and the State Historically Has Involved Itself in, and Extensively Regulated, Their Affairs; The Mandated Services Act Reflects This Supervision and Does Not Create Improper Government Entanglement with Religion**

In developing the "entanglement" test, this Court has stressed that some entanglement between church and state is unavoidable and that only *excessive* entanglement is unconstitutional. As stated in *Walz* v. *Tax Commission of the City of New York*:

> No perfect or absolute separation [between religion and government] is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement. 397 U.S. at 670.

In *Lemon* v. *Kurtzman*, this Court explained the factors which must be explored to ascertain if, in fact, there is excessive entanglement:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. 403 U.S. at 615.

But, "[n]o one of these three factors standing alone is necessarily controlling," *Tilton* v. *Richardson*, 403 U.S. at 688. It is their combination which is decisive.

Testing the Mandated Services Act by these criteria, there is no unconstitutional entanglement between government and religion.

*The Extensive Supervision Exercised by New York State Over Nonpublic Education*

All of the educational enterprises in New York have been integrated since 1784 in The University of the State of New York, the oldest continuous state educational administrative agency in the United States. The University, headed by the Board of Regents, encompasses all elementary and secondary schools and higher institutions of learning, public and private, as well as all museums, historic sites and libraries. The New York approach to education has been unique, and the Mandated Services Act is unlike any other statute in the United States.[7]

The public and nonpublic schools in the State of New York comprise a single system of education under the jurisdiction of the Board of Regents and the Commissioner of Education,[8] who are empowered and required to ensure that all the schools in the system give their pupils an adequate education along the lines laid down by statute and

[7] The function of the Act, however, is not unique in the State of New York. For example, from 1892 through 1968, state monies were apportioned to nonpublic schools in compliance with state rules and regulations. *See, e.g.*, An Act to Revise and Consolidate the Laws Relating to the University of the State of New York, [1892] Laws of N.Y. ch. 378, § 26.

[8] Under New York law, the Board of Regents, which is composed of 15 members, heads the State Education Department. The Board's chief administrative officer is the Commissioner of Education, who is appointed by the Regents. With the exception of the Deputy Commissioner, all other officers and employees of the Education Department are appointed by the Commissioner, subject to approval by the Regents.

by the regulations of the Commissioner. The broad extent to which nonpublic schools in New York are regulated and controlled by state authority with respect to the secular aspects of their operation was noted by this Court in *Allen.* Citing several sections of the New York Education Law,[9] this Court put the matter of state regulation of nonpublic schools in the following terms:

> . . . Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce* v. *Society of Sisters*: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. Another corollary was *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930), where appellants said that a statute requiring school books to be furnished without charge to all students, whether they attended public or private schools, did not serve a "public purpose", and so offended the Fourteenth Amendment. Speaking through Chief Justice Hughes, the Court summarized as follows its conclusion that Louisiana's interest in the secular education being provided by private schools made provision of textbooks to students in those schools a properly public concern: "[The State's] interest is education, broadly; its

[9] *See* 392 U.S. at 246 n. 7.

method, comprehensive. Individual interests are aided only as the common interest is safeguarded." [10]

Section 207 of the New York Education Law sets forth the legislative authority which the Board of Regents has been granted "concerning the educational system of the state" to "determine its educational policies" and to "establish rules for carrying into effect the laws and policies of the state relating to education." The broad scope of this responsibility is indicated by the section's very limited exception which removes from the authority of the Regents only those educational programs in New York relating solely to the religious training of clergymen. Section 215 of the Education Law provides:

> The regents, or the commissioner of education, or their representatives, may visit, examine into and inspect, any institution in the university and any school or institution under the educational supervision of the state, and may require, as often as desired, duly verified reports therefrom giving such information and in such form as the regents or the commissioner of education shall prescribe. For refusal or continued neglect on the part of any institution in the university to make any report required, or for violation of any law or any rule of the university, the regents may suspend the charter or any of the rights and privileges of such institution.[11]

The compulsory education statute (N.Y. Educ. Law § 3204) requires all children to attend full-time instruction

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[10] 392 U.S. at 245-47 (footnotes 7, 8 omitted). *See also Everson v. Board of Education,* 330 U.S. 1, 17 (1947).

[11] Section 216 of the Education Law empowers the Regents to charter, on such terms as they may prescribe, all institutions in the field of education, public and nonpublic alike. The Regents can also suspend or revoke the charter of any such institution.

"at a public school or *elsewhere.*" If "elsewhere," the instruction given must be *"at least substantially equivalent"* to that given in the public schools of the district where the child resides. To ensure this, statutes and regulations impose a long list of detailed requirements upon nonpublic schools in such fields as attendance, curricula, examinations, accreditation and diplomas.

Exhibit C of the Supplement to Appendix sets forth extracts of most of the provisions of the Education Law and the regulations of the Commisioner of Education relating to attendance. Section 3210.2 of the New York Education Law reads, in part, as follows:

> Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.
>
> b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.
>
> c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

Section 3211 ("Records of attendance upon instruction") provides that:

> . . . The teacher of every minor required by the provisions of part one of this article to attend upon instruction . . . shall keep an accurate record of the attendance and absence of such minor . . .

3. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours, demand the production of records of attendance of minors required to be kept . . . and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.

4. Duties of principal or person in charge of the instruction of a minor. The principal of a school, or other person in charge of the instruction upon which a minor attends . . . shall cause the record of his attendance to be kept and produced and all appropriate inquiries in relation thereto answered as hereinbefore required. . . .[12]

State supervision of the curricula of nonpublic schools is equally as comprehensive. Section 3204.3 states:

Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government in the Declaration of Independence and established by the constitution of the United States. . . .

[12] *See also* Regulations of the Commissioner of Education § 101.7.

These curricula requirements are made applicable to nonpublic schools pursuant to N.Y. Educ. Law § 3204.2, *supra.* In addition to providing instruction in accordance with Section 3204, all nonpublic schols must provide instruction in a number of other specified areas. *See* N.Y. Educ. Law §§ 801-10. Indeed, so pervasive is the supervision of nonpublic schools by the State of New York that, for example, when such schools desire to offer a course for which there is no state-prepared syllabus, they "need to apply to the Bureau of Secondary Curriculum Development for approval if the course is to be given Regents credit." State Educ. Dep't, *The Secondary School Curriculum of New York State—A Handbook for Administrators* 6 (1970).

Nonpublic schools, as well as public schools, administer numerous state-prescribed examinations, including the so-called PEP (Pupil Evaluation Program[13]) tests, Regents examinations and Regents Scholarship examinations.[14] On

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[13] "The Elementary and Secondary Education Act of 1965 requires the annual use of objective measures to evaluate its role in improving pupil achievement. Towards that end, the Department [of Education] has established a statewide testing program to assess the achievement status of every pupil in selected grades in New York State. Each fall, *all public and nonpublic schools* in the State administer the following tests:

| | |
|---|---|
| Grades 3 and 6 | Reading Test for New York State Elementary Schools, Form A |
| | Arithmetic Test for New York State Secondary Schools, Form A |
| Grade 9 | Minimum Competence Test in Reading for New York State Secondary Schools |
| | Minimum Competence Test in Arithmetic Fundamentals for New York State Secondary Schools" |

State Educ. Dep't, *Handbook on Examinations and Scholarships* 29 (1968) (emphasis added).

[14] For a detailed description of all of the various state examinations, *see generally* the *Handbook ibid.*

the other hand, "[i]mportant as Regents examinations and standardized tests are in the total school testing program, the backbone of day-by-day evaluation in the school is the classroom test." State Educ. Dep't, *Improving the Classroom Test—A Manual of Test Construction Procedures for the Classroom Teacher* 5 (1964). In view of this, nonpublic schools are required to

> conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner.[15]

Nonpublic schools are also required to maintain records relating both to the qualifications and characteristics of their teaching personnel and to the health of their pupils. In sum, the regulation of nonpublic education by the State of New York is so complete and its equivalency to public education so well accepted that a graduate of a religiously-affiliated high school obtains his diploma, not from his school, but rather from the State Board of Regents. *See* N.Y. Educ. Law § 208.

The Mandated Services Act did not establish a relationship of supervision and control by the State of New York over its nonpublic schools where none existed before or where such relationships, on their face, are constitutionally impermissible. This relationship was created by the vari-

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[15] Regulations of the Commissioner of Education § 176.1(b). For an updated compilation of regulations of the Commissioner relating to nonpublic schools, see the Appendix to this brief, pp. 6a-7a. *Cf.* Exhibit E, Supplement to Appendix.

ous statutes, rules and regulations imposing attendance, curricula and other requirements on nonpublic schools in order to satisfy the state's clear interest in maintaining and improving educational standards for all children. The Act merely assures full compliance therewith.

*The Nature of the Aid*

The Mandated Services Act provides for reimbursement of nonpublic schools for the expenses of services incurred by them as a result of state requirements connected with administration, grading and compiling of the results of tests and examinations, maintenance of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics, and the preparation and submission to the State of various other reports as provided for or required by law or regulation. The reimbursement formulas for such services are 15 cents per day per pupil in grades 1-6 (or $27 per year) and 25 cents per day per pupil in grades 7-12 (or $45 per year). In view of state studies, which by stipulation are accepted fact in this case,[16] showing the actual costs of the state-mandated services per pupil per year, it is clear that the reimbursement covers only a part of the expenses incurred by nonpublic schools. *See* Exhibit D, Supplement to Appendix. No audit is provided for because none is needed in view of the limited nature of the reimbursement. As Judge Palmieri pointed out below:

> . . . The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides ade-

[16] *See* Appendix, p. 91a.

quate assurance that government funds are not available for examination functions peculiar to religious institutions. 342 F. Supp. at 445; JS Appendix, p. 15a.

Looking separately at the various types of services for which reimbursement is made, it is impossible to find any sectarian features in the costs associated with the maintenance of attendance records, health data and other such information. Nor can it be reasonably concluded that costs incurred in connection with examinations prepared by state officials, such as the Regents Examinations, serve a sectarian purpose. Yet the District Court has declared reimbursement for such expenses to be an unconstitutional establishment of religion. We submit that this is clearly erroneous.

Similarly, an evaluation of the expenses attributable to examinations prepared and administered by the nonpublic schools themselves in the various subjects required by state law does not lead to the conclusion reached by the District Court majority. First, the District Court majority disregarded the fact that Commissioner's Regulation §176.1(b) specifically requires nonpublic schools to "conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement." Section 2 of the Mandated Services Act reads:

> There shall be apportioned annually by the commissioner to each qualifying school . . . amounts . . . for expenses of services for examination and inspection in connection with administration, *grading and the compiling and reporting of the results of tests and examinations*, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications

> and characteristics and the preparation and submission to the state of various other reports as *provided for or required by* law or *regulation.* (emphasis added)

There can thus be no question but that tests referred to by the District Court are mandated by New York law. Secondly, the District Court majority disregards the state's primary interest in testing as the fundamental tool in evaluating levels of achievement. Tests and examinations, terms used interchangeably, ordinarily are used to refer to a "series of questions or tasks designed to measure the knowledge or skill of an individual." Encyclopedia of Educational Research 1502 (3d ed. 1960). The importance of assessment or evaluation in the educational process is well-recognized. From earliest times, tests have been a basic means of measuring educational progress. Horace Mann introduced wide-scale testing programs as aids in the maintenance and improvement of educational standards. J. M. Rice developed objective tests for use in his surveys of school accomplishments, and Lindquist designed tests to measure the basic and ultimate outcomes of an educational program. *Cf. id.*

The state is vitally interested in levels of achievement, and it has a duty to determine that nonpublic school pupils are receiving an education *substantially equivalent* to that provided in public schools. Of all of the methods used to determine this, including curricula contents, teacher qualifications, facilities and equipment, class size, testing is the most important. Indeed, the state requires the same continuing program of individual pupil testing in the public schools. *See* Regulations of the Commissioner of Education § 102.2. In short, testing is an integral part of the state's continuing effort to assure that both public and

nonpublic schools are maintaining appropriate levels of educational achievement.

Certainly, one of the most important types of testing is the routine classroom test prepared and administered by classroom teachers to measure levels of proficiency and improvement on a frequent basis. Such examinations are just as significant in the educational process, if not more so, as the annual Regents examinations or the periodic PEP tests prepared by state officials. To conclude, as the District Court majority did, that reimbursement for such expenses is unconstitutional because "testing is an integral part of the teaching process" [17] wholly ignores the fact that nonpublic schools play "a significant and valuable role in raising national levels of knowledge, competence, and experience" and that they "are performing, in addition to their sectarian function, the task of secular education." *Board of Education* v. *Allen,* 392 U.S. at 247, 248. Nonpublic school examinations are therefore comparable to those given in public schools and cannot be dismissed as indirect efforts to inculcate religion. To say that reimbursement for classroom testing is impermissible because such testing may involve the furtherance of sectarian views is not only unsupported by the record in this case; it asks this Court to accept the premise that religious teaching in the New York nonpublic schools permeates their secular functions. This Court has consistently refused to accept this unproven premise. *See Board of Education* v. *Allen; Tilton* v. *Richardson,* 403 U.S. at 681. There is no basis for accepting in this case such an erroneous view of the function of nonpublic education in New York.

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[17] 342 F. Supp. at 444; JS Appendix, p. 12a.

*The Nature of the Schools Receiving Reimbursement*

Despite this Court's admonition in *Tilton* against striking down legislation on the basis of a "hypothetical profile," [18] the majority of the District Court did, in fact, rely on such a profile when it stated that "there is no question as to the character and purposes of the institutions which are benefited." 342 F. Supp. at 445; JS Appendix, p. 9a.

The only evidence in the record on the point deals with the five schools which are before this Court. No clear pattern is evident as to these schools.

As noted above, appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School are all affiliated with the Roman Catholic Church. Not one of these three schools, however, is an integral part of the religious mission of the Church. All are an integral part of the communities in which they are located. Their principal purpose is education. They do not impose religious restrictions on pupil admissions or on faculty appointments. They do not require their pupils to attend religious activities or to adhere to a particular faith. *See generally* Appendix, pp. 61a-84a.

These schools are obviously only a few of the religiously-affiliated nonpublic schools in New York. The record is silent as to the extent and details of the religious affiliations of other schools. However, there is some available data showing the diversity among them which make inappropriate the type of generalizations indulged in by the District Court majority. As of the fall of 1968, there were 1,415 Roman Catholic, 164 Jewish, 59 Lutheran, 49 Episcopal, 37 7th Day Adventist and 18 other religiously-affili-

[18] 403 U.S. at 682.

ated nonpublic schools[19] in New York. There are also 296 nonpublic schools with no religious affiliations. *See* Exhibit I, p. 3, Supplement to Appendix. Thus, while a majority of New York nonpublic schools are affiliated with the Catholic Church, there are a substantial number (623) of such schools which are affiliated with other religious organizations or none at all.[20]

> In 1968-69, well over half (61.6 percent) of the pupils enrolled in nonpublic schools in New York State attended schools in the "Big Six" cities of Albany, Buffalo, New York, Rochester, Syracuse and Yonkers. . . . New York City alone had slightly more than half the enrollment (51.4 percent), and an additional 10.2 percent was accounted for by the other large cities (Buffalo, 4.3 percent; Rochester, 1.9 percent; Albany, 1.5 percent; Yonkers, 1.3 percent; Syracuse 1.2 percent).[21]

Since a majority of New York nonpublic schools are located in the City of New York and are affiliated with the Roman Catholic Church, a look at the makeup of such schools in New York City is perhaps revealing.[22] For ex-

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[19] Includes schools affiliated with Society of Friends, Mennonite, Greek Orthodox, Russian Orthodox, Methodist and Baptist churches.

[20] The District Court majority's error in summarily equating nonpublic education with religion is further exemplified by the language of its permanent injunction, which also enjoins Mandated Services Act payments to the 296 nondenominational schools, even though such payments could not, under any circumstances, be construed to violate the Establishment Clause, a fact which appellants herein pointed out to the District Court.

[21] Exhibit I, p. 4, Supplement to Appendix.

[22] In addition to Bishop Loughlin Memorial High School, there is data in the record of this case with respect to 16 other specifically named Catholic elementary and secondary schools located within the City of New York. *See* Affidavits numbered 9, 12, 17, 18, 19, 20, 21, 22, 23, 24, 32, 33, 34, 35, 36 and 38, Appendix F, Doc. No. 49, Record on Appeal.

ample, out of 65,937 pupils enrolled last year in Catholic elementary schools in the Bronx, New York and Richmond counties, 30,992 were non-white. "Today, more than sixty percent of [Catholic nonpublic school] elementary school students in Manhattan are Black or Spanish-speaking; thirty percent in the Bronx." *Hearings on H.R. 16141 and Other Pending Proposals Before Committee on Ways and Means,* 92nd Cong., 2d Sess., pt. 3, at 583 (Sept. 7, 1972). As for the parents of these children:

> . . . The father is usually a blue or white collar worker, more frequently found in the unskilled area of work than performing professional tasks. He is in a stable marriage union to a woman who works at home. The mother seems to move into the market place as a full time worker when she sends her children to Catholic high school. These Catholic school parents in New York City, far from being affluent, earn a modest income . . .
>
> The take-home pay of such families illustrates the economic struggle going on within these homes. About one quarter took home less than $100 per week and more than three out of every five families (62 per cent) cleared less than $150.00. In some New York counties, where large numbers of Negroes and Spanish had children in parochial schools, the economic picture was somewhat darker. In Manhattan, for example, 41 per cent reported less than $100 weekly and 77 per cent less than $150.[23]

Out of 4,704 teachers in the elementary schools under the auspices of the Archdiocese of New York in 1971-72, over 60 percent (2,844) were lay teachers. About 50 percent (1,356 out of 2,274) of the teachers in the high schools in the Archdiocese during the past school year were laymen.

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[23] Kelly, *The "Nearly Poor Catholics" in New York City,* 1 St. John's Univ., N.Y. Research Bulletin 2 (Jan., 1972).

The composition of Catholic nonpublic schools in the other urban areas of the State of New York is substantially similar. Appellant Cathedral Academy, for example, which is located in a federally designated poverty area of Albany, has a total enrollment of 513 pupils; 235 are black, 231 are *not* Catholic. *See* Brief for Intervenor-Defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School, p. 9, Doc. No. 27, Record on Appeal. In short, whatever the composite profile of nonpublic schools in the State of New York might be, it is by no means that portrayed in the majority opinion herein, and it was error for the District Court majority to have accepted and relied on this wholly unfounded formulation, one which was specifically contradicted by the answers to interrogatories of the nonpublic schools actually before the court.

**The District Court Majority Erred With Respect to the Entanglement Issue**

The District Court majority erred in its reliance on *Lemon* v. *Kurtzman* and in concluding that *any* involvement of the state with nonpublic schools is equivalent to the *excessive* or *unreasonable* entanglement between government and religion which this Court has held to be unconstitutional.

The majority opinion of the District Court relies primarily on the decision of this Court in *Lemon* v. *Kurtzman*. But that decision dealt specifically with a Pennsylvania enactment providing for that state's payment of parochial schoolteachers for teaching mathematics, modern foreign languages, physical science and physical education and a Rhode Island statute providing for the payment by that state of salary supplements to parochial schoolteachers in the amount of 15 percent of their salaries. Clearly, neither

law examined in *Lemon* v. *Kurtzman* had anything to do with the neutral, nonideological services required of, and provided by, all schools, public and nonpublic alike, and which are within the purview of the Mandated Services Act. Indeed, this Court took specific note of the fact in *Lemon* v. *Kurtzman* that its "decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause." 403 U.S. at 616-17. Judge Palmieri, in dissent in the case at bar, stated:

> . . . It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), the allocation procedure for free books in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), and *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 644 (1970). If, as the Supreme Court pointed out in *Allen, supra,* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso,* 403 U.S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with

religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* . . . 342 F. Supp. at 446, JS Appendix, pp. 16a-17a (footnote omitted).

In holding the Pennsylvania statute in *Lemon* v. *Kurtzman* unconstitutional, for example, this Court stressed that the state's "post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." 403 U.S. at 621-22. No auditing of the books of nonpublic schools is provided for or required by the Mandated Services Act, because the record shows that the amounts reimbursed are substantially less than the cost to the nonpublic schools of performing the services. The District Court majority's prediction as to the probable future need for a state audit to prevent overpayment to the schools is unwarranted speculation in view of this record. Furthermore, the Act has not given rise to a "comprehensive, discriminating, and continuing state of surveillance," something which this Court found to be inevitably required in *Lemon* v. *Kurtzman*. *See* 403 U.S. at 619. Whatever surveillance is involved herein has existed and been carried out as a result of the long-established procedures under the compulsory education laws, not the enactment of the Mandated Services Act. In short, insofar as any new relationship between the State of New York and nonpublic schools arose as a result of the Act, that relationship is no more significant or entangled than those found constitutionally acceptable in *Everson, Allen* and *Tilton*.

The District Court majority not only misinterpreted *Lemon* v. *Kurtzman*, it also failed to consider this Court's repeated statements that some involvement between government and religion is unavoidable and permissible and that involvement becomes unconstitutional only when it is "unreasonable" or "excessive". As discussed above, any involvement herein is due to the historic supervisory role of the State of New York over nonpublic education, not to the Mandated Services Act. Such involvement, based on the state's undoubted power to supervise all education within its borders, can hardly be considered as "excessive" or "unreasonable". The majority opinion below disregarded this historic relationship.

Nor does the Act present a potential for later excessive involvement or entanglement. First, the services mandated are administrative and noninstructional. Second, the requirement for these services originated with the state, long antedated the Act and is intended to benefit the state as the regulatory agency and the child whose education is involved, rather than the nonpublic school which is required to perform these services as a convenience to the state. Moreover, the amounts reimbursed are substantially below the actual expense of performing these services, as shown by state studies. Finally, the money is paid retroactively as reimbursement for services rendered, rather than in advance.[24] Considering all these factors, the conclusion of the District Court majority was erroneous.

The record in this case also does not support the District Court majority's speculation with respect to divisive

[24] A nonpublic school applying for payment must submit proof that it provided all of the services mandated. *See generally* Form SA-170, Exhibit H-1, Supplement to Appendix.

political activity. *See* 342 F. Supp. at 444-45; JS Appendix, p. 12a. Indeed, both the history of the Mandated Services Act and the history of nonpublic education in the State of New York, in general, show a remarkable lack of political divisiveness. Certainly, differences of opinion are part of the American political process. But divisiveness, in the negative context of the word, has been all but nonexistent with respect to the Mandated Services Act. There has not been any annual legislative appropriation dispute over the Act. Furthermore, there hardly could be such discord in view of the Act's limited scope and restricted, precise formulas.

## Conclusion

The Mandated Services Act is in all respects constitutional, and the judgment appealed from should be reversed with a direction to the District Court to dismiss the complaint.

Dated: December 28, 1972

Respectfully submitted,

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## Chapter 138 of the 1970 Laws of New York

### AN ACT

To provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state pur-

poses are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such re-

duction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils who are resident of the state during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of such enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid

required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid between January fifteenth and March fifteenth of such year, and the second to consist of the balance and to be paid between April fifteenth and June fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

§ 7. The sum of twenty-eight million dollars ($28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect September first, nineteen hundred seventy.

## PART 176

### Apportionments to Nonpublic Schools in Connection with Examination and Inspection

Section 176.1. *Qualification.* To qualify for apportionments of State monies in connection with examination and inspection pursuant to the provisions of Chapter 138 of the Laws of 1970, a nonpublic school shall meet each of the following requirements:

(a) All teachers serving on the staff of such school shall either possess a valid teacher's certificate issued by the commissioner, or shall be certified by the chief administrative officer of such school as meeting all the requirements of such school for the position in which the teacher serves.

(b) Such school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner.

(c) Such school, if it offers instruction at the secondary level (any of the grades seven through twelve) shall submit annually to the State Education Department, at such time and in such form as the commissioner may require, a *Secondary School Report* (Private Schools).

(d) Such school shall submit annually to the State Education Department, at such time and in such form as the commissioner may require, a *Report of Nonpublic Schools* (Basic Educational Data System).

(e) Such school shall submit to the State Education Department, at such times and in such form as the commissioner may require, such additional information as may be specified by the commissioner pursuant to the provisions of Education Law section 215.

(f) Such school shall maintain, in a form and manner specified by the commissioner, a register of the attendance of each pupil enrolled in the school. All such registers shall be retained by the school for a period of not less than fifty years following the close of the school year for which each such register was maintained, and shall be made available for inspection by authorized representatives of the State Education Department upon request. Summaries of such attendance registers shall be submitted annually to the State Education Department at such time and in such form as the commissioner shall prescribe.

(g) Such school shall be organized and conducted solely for educational purposes, and no part of its assets or income shall be distributable to or enure to the benefit of any shareholder, director, officer or employee, except for reasonable compensation for services rendered. If such school is a corporation, it shall possess a valid and current certificate of exemption from taxation issued pursuant to United States Internal Revenue Code Section 501 (c) (3).

Section 176.2. *Application for apportionment.*

(a) Each application by a nonpublic school for an apportionment of State monies in connection with examination and inspection pursuant to Chapter 138 of the Laws of 1970 shall be submitted to the State Education Department at such time and in such form as the commissioner shall prescribe, and shall certify that throughout the "base year," as defined in Chapter 138, the school did in all respects comply with, and during the "current year," as defined in Chapter 138, the school will comply with all the provisions of Education Law sections 313, 801 through 811, 3204 and 3210, paragraph 2, to the extent that such provisions are applicable to a school offering instruction in the grades conducted by the school submitting such application.

(b) A school which elects to be considered a religious or denominational educational institution for the purposes of Education Law section 313 shall submit to the State Education Department, with the application referred to in subdivision (a) of this section, a certification, in the form prescribed by the commissioner, pursuant to the provisions of paragraph (4) of section 313 of the Education Law.

Section 176.3. *Payment of apportionments.*

(a) Apportionments to a qualifying school which is incorporated by the Board of Regents or pursuant to a general or special law shall be paid to the corporation.

(b) Apportionments to a qualifying school which is not incorporated shall be paid, on behalf of such school, to a corporate body, designated by such school and approved by the commissioner, whose corporate purposes include the supervision or support of such school, or if there is no such corporate body, to a corporation authorized to do business in this state which is designated by such school, with the approval of the commissioner, for the purpose of receiving such payments for the benefit of such school.

# APPELLEES

# BRIEF

9

IN THE

# Supreme Court of the United States

October Term, 1972

Supreme Court, U. S.
FILED
JAN 15 1973
MICHAEL RODAK, JR., CLERK

**Nos. 72-269, 72-270, 72-271**

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

*Appellants,*

*vs.*

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

*Appellees.*

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EARL W. BRYDGES, as Majority Leader and President pro tem of the New York State Senate,

*Appellant,*

*vs.*

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*Appellees.*

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CATHEDRAL ACADEMY, *et al.*,

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*vs.*

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*Appellees.*

**On Appeal from the United States District Court for the Southern District of New York**

# BRIEF FOR APPELLEES

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**On Appeal from the United States District Court for the Southern District of New York**

## BRIEF FOR APPELLEES

### Question Presented

May a State, consistent with the First Amendment to the United States Constitution, appropriate tax-raised funds to parochial schools to compensate them for expenses incurred in keeping records and conducting tests?

## Statement of the Case

### A. The Act

This is a taxpayers' suit challenging the constitutionality under the First Amendment of Chapter 138 of New York Laws of 1970 (hereinafter referred to as the Act) which appropriated $28,000,000 for the school year 1970-71 (Section 7), and corresponding sums for ensuing years, to pay for certain services performed by nonpublic schools. These services are set forth in the Act (Section 2) as "administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission of the state of various other reports as provided for or required by law or regulation."

The formula according to which the funds are to be apportioned among the schools is based on the number of pupils in each school, $27 being paid for each pupil in grades 1 through 6, and $45 for each in grades 7 through 12 (Section 2).

Section 8 of the Act provides that "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction." However, nothing in the Act requires or makes any provision for the return to the State of any sums paid in excess of the amounts expended by the schools for the statutorily designated purposes, nor does the Act require the schools to report or account for the funds.

**B. The Background of the Act**

The Act was submitted to the Legislature by the Governor, and how the formula of $27 and $45 per pupil was arrived at is something of a mystery. One thing is certain: it did not come, as one would expect it would, from the professional expertise of the Department of Education. In response to an Interrogatory (No. 1) propounded to the defendants-appellants, the Commissioner of Education answered as follows:

> That prior to the enactment of Chapter 138 of the Laws of 1970, a conference was held in which representatives of the Office of the Counsel to the Governor, of the Division of the Budget in the Executive Department and of the State Education Department participated; that at said conference the representatives of the State Education Department were asked whether the dollar amount in question was reasonable and that the answer was that to the best of their judgment the amount was reasonable; that no record of the conference was made (App. 85a-86a).

The most reasonable if not only explanation for the formula is the following. Contemporary newspaper accounts indicated that in response to pleas of dire need from religious school authorities the Governor promised to submit to the Legislature one or more measures to meet that need. The bill which became the Act herein was submitted by the Governor. (See Exhibit B of defendants' Answers to Interrogatories.) The Governor most probably determined that he could spare $28,000,000 from his 1970-71 budget for that purpose and directed the Division of the Budget to work out a formula by which that amount could be distributed to the religious schools, and out of their computations came the statutory formula.

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The reason the appropriation was made in an "Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination * * *", is, as conceded by defendants-appellants (Brief, p. 16), to be found in the fact that Article XI, Section 3 of the New York State Constitution forbids appropriations in aid of religious schools "other than for examination or inspection."

### C. The Application of the Act

#### *1. Eligibility*

The defendants-appellants interpret and apply the Act to include as permissible beneficiaries schools which (a) impose religious restrictions on admissions: (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach (App. 53a-54a, 88a).

#### *2. Reporting and accounting*

The beneficiary schools do not and are not required to submit reports accounting for the moneys received and how they are expended (App. 52a-53a, 87a).

### 3. *Relationship of sums received to actual expenditures for mandated services*

The sums granted to a school need bear no relationship to the costs of the mandated services. "As a matter of fact, reimbursement is provided on the basis of a formula which is in itself independent of such costs * * *." (Exhibit G to defendants-appellants' Answers to Interrogatories, p. ES 1.8.) Thus, in a typical case (Catholic Central School) the beneficiary was entitled under the statutory formula to receive the sum of $77,878 although the actual cost of mandated services was only $24,674 (*ibid.*, p. ES 1.9); and in another typical case (North Shore Hebrew Academy), the school was entitled to receive $27 per pupil for a total grant of $5,400 although the actual per pupil cost of mandated services was $8.88 for a total of $1,776. (*Ibid.*, p. ES 1.10.)

### 4. *The relationship of examination costs to other costs*

Exhibits D and G, submitted in response to Interrogatory 6 (App. 53a), show that by far the major expense within the contemplation of the Act as interpreted and applied by the defendants-appellants consists of the prorated cost of teachers' services in preparing and administering examinations. Thus, in the case of Catholic Central High School the total costs of all services was $84,033, of which fully $68,853 represented the cost of teachers' services in reporting and administering examinations; in the North Shore Hebrew Academy the respective sums were $8,492 and $6,716.

Examinations fall into two classes: external examinations formulated outside the church school or the church

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school system, such as State Regents, Pupil Evaluation Programs (PEP), intelligence tests, etc.; and internal examinations, i.e., those formulated by the teachers themselves or the Diocesan authorities. The exhibits show clearly and it is conceded by defendants-appellants (Brief pp. 9, 16), that the costs of internal examinations far exceed those of external examinations. Thus, of the $68,853 attributed to examinations in Catholic Central High School, fully $65,172 was attributed to teachers' and Diocesan examinations. In the North Shore Hebrew Academy, the total costs attributed to statutory services was $8,492 of which $6,716 was attributed to teachers' examinations (Exhibit G, pp. ES 1.8-1.10).

#### *5. Accountability for excess of grant over expenditures*

The beneficiary schools are not required to account for or return any excess of sums granted over the amounts actually expended for mandated services, and hence may use such excess for religious worship or sectarian instruction (Exhibit G, p. ES 1.8; App. 87a, 88a).

## Summary of Argument

The Act is unconstitutional on its face under the Establishment Clause of the First Amendment for at least three reasons: First, it constitutes governmental financing and subsidizing of schools which are controlled by religious bodies and are organized for and engaged in the practice, propagation and teaching of religion; and it is immaterial that the appropriation purports to be to compensate for services which may or may not be required by law. Second,

it necessarily and inevitably gives rise to excessive governmental involvement in and entanglement with religion. Third, it constitutes governmental action whose primary effect is to advance religion.

The Act as applied is unconstitutional under the Establishment Clause for at least three reasons: First, it allows the moneys granted to be used in whole for religious worship and sectarian instruction. Second, it allows at least the excess of the granted moneys over the costs of the mandated services to be used for religious worship and sectarian instruction. Third, it includes in the concept of statutory services internal (i.e., teacher or Diocesan) examinations which are a form of teaching and may be religious teaching.

## ARGUMENT

### I

### The statute challenged herein is unconstitutional on its face as violative of the Establishment Clause of the First Amendment.

#### A. The Frame of Reference

The main thrust of the briefs of all appellants is that the underlying legislative purpose is not to aid religion but to further the secular education of pupils in nonpublic schools. Assuming this to be true, the fact remains that the frame of reference in this case, as in all cases of governmental financing of the operations of religious schools, is the First Amendment. This was clearly stated by this Court within the past year in the following words:

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Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress. Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971). See also Everson v. Board of Education, 330 U.S. 1, 18 (1947). *Wisconsin* v. *Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 1532-33 (1972).

**B. Governmental Subsidization of Sectarian Schools**

If there is any proposition in constitutional law which may be said to be firmly established it is that under the Establishment Clause government may not make unrestricted grants of public funds to schools organized for or engaged in the practice, propagation and teaching of religion. *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); *Board of Education* v. *Allen,* 392 U.S. 236 (1968); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Earley* v. *DiCenso,* 403 U.S. 602 (1971); *Tilton* v. *Richardson,* 403 U.S. 672 (1971); *Johnson* v. *Sanders,* 319 F. Supp. 421 (U.S. D.C. Conn.), *affirmed* 403 U.S. 955 (1971); *Wolman* v. *Essex,* 342 F. Supp.

399 (E.D. Ohio), *affirmed* —— U.S. ——, 93 S. Ct. 61 (1972); *Americans United for Separation of Church and State* v. *Oakey*, 339 F. Supp. 545 (U.S. D.C., Vt. 1972); *Kosydar* v. *Wolman*, —— F. Supp. —— (U.S. D.C., S.D. Ohio, decided December 29, 1972).

The sole basis therefore upon which the appellants contend and can contend for constitutionality in the present case is that the grants are purportedly earmarked to pay for mandated inspection and examination costs. We believe that this reliance is completely unfounded.

It is true, of course, that in *Everson* the Court upheld the constitutionality of a statute appropriating public funds for transportation to religious schools, and in *Allen* it held the same in respect to a statute authorizing the loan of secular textbooks to pupils in such schools. But in *Everson* the Court was careful to point out that the statute there approached "the verge of [constitutional] power" (330 U.S. at 16); and in *Lemon* the Court indicated that it was not prepared to go any further than permitted by these decisions, namely, "[b]us transportation, school lunches, public health services, and secular textbooks supplied in common to all students * * *" (403 U.S. at 616-617).

In *Lemon, DiCenso* and *Johnson* v. *Sanders*, the Court struck down statutes which in different ways sought to appropriate public funds to pay for secular teaching in religious schools. In *Lemon*, the Court pointed out one way in which these statutes differed from those in *Everson* and *Allen*. The Court said:

> The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to

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> the church-related schools. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. * * * (403 U.S. at 621)

We do not suggest that this is the only constitutionally relevant distinction between the present case and *Everson* and *Allen*, or that all forms of indirect governmental aid to church-related schools are permissible under the Establishment Clause. We submit only that at the very least *Lemon* holds unconstitutional on its face a law providing direct financial aid to church-related schools, and that the Act herein concededly is such a law.

It is no answer that *Lemon*, *DiCenso* and *Johnson* v. *Sanders* dealt with teaching services whereas the present statute refers to inspection and examination services. In the first place, examination costs are as much a part of the cost of maintaining and operating a school as are teaching costs. In the second place, as will be discussed more fully later, examinations are an integral part of the teaching process. Finally, nothing in the cited cases indicates that the strictures of the Establishment Clause are limited to teaching expenses; *Tilton* v. *Richardson*, which allowed construction costs for colleges and then only under severe restrictions not complied with here (see Interrogatory 4 and Answer thereto, App. 52a, 87a) indicates quite clearly that construction costs would not be allowable in cases of elementary and secondary schools.

At the conclusion of his opinion expressing his dissent in *DiCenso* and his concurrence in *Tilton* and partial con-

currence in *Lemon,* Mr. Justice White said (403 U.S. at 671):

> As a postscript I should note that the Court decides both the federal and state cases on specified Establishment Clause considerations, without reaching the question that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.

This statement applied not only to the *Lemon* and *DiCenso* cases, which concerned teaching in elementary and secondary schools, but no less to *Tilton* which concerned construction grants for facilities used exclusively for secular purposes. In the present case, as we have noted above, the defendants-appellants concede that the Act applies to schools which restrict entry on religious grounds and which require all students to receive instruction in the tenets of a particular faith.

Nor is it any answer that the services for which the grants are purportedly made are required by law; so too were the secular teaching services involved in *Lemon, DiCenso, Johnson* and *Oakey, supra.* Moreover, record keeping and examinations are not the only requirements imposed by law upon nonpublic schools. The schools must be conducted in safe, sanitary, well-lit and well-heated buildings. If the proposition that what is mandated may be paid for were adopted, it would be constitutional for the State to pay for sanitation, repairs, fuel, lighting and a host of other maintenance services in parochial schools. The District

Court for the Southern District of New York unanimously held this not constitutionally permissible (*Committee for Public Education and Religious Liberty* v. *Nyquist*, decided June 1, 1972); if it were, there would, we submit, be little left of the Establishment Clause.

### C. Government Entanglement with Religion

In *Lemon* and *DiCenso*, the Court noted that the challenged statutes provided that none of the funds granted thereunder were to be used for religious worship or sectarian instruction. The Court further noted that these provisions recognized the unchallenged truth that if the statute authorized use of the funds for these purposes it would be patently unconstitutional. But, the Court pointed out, the enforcement of this provision involves the government in the entanglement with religion that it was the purpose of the Establishment Clause to prevent and forbid.

This is exactly the situation in the present case. The Act (Section 8) expressly forbids the use of any of the granted funds for religious worship or instruction. As we have noted in our Statement of the Case and will discuss further hereinafter, this provision is completely disregarded in the application of the Act, but under *Lemon* and *DiCenso* its very presence in the Act renders the statute unconstitutional by inevitably requiring that "comprehensive, discriminating, and continuing state surveillance" which the First Amendment forbids (403 U. S. at 619). The District Court, we submit, was eminently correct in its statement that

> [t]he dilemma * * * is insoluble. Either the statute falls because a system of surveillance and control would

create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

**D. Purpose and Effect**

In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), the Court announced what has since become known as the purpose-effect test. The Court there said (at p. 222):

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion.

In *Lemon-DiCenso*, the Court, having determined that the statutes were unconstitutional under the entanglement test, did not find it necessary to consider them under the purpose-effect test. In *DiCenso*, the District Court did address itself to the latter test and held the Rhode Island statute unconstitutional under that test as well as under the entanglement test. Judge Coffin, speaking for the Court, said (316 F. Supp. 112):

> The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental." Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance." The problem

of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "the primary effect", as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.

Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' [intervenors' (?)] proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities. * * *

In a footnote, Judge Coffin added:

> Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. * * *

What Judge Coffin said in *DiCenso* is no less applicable here. Examinations are an integral part of teaching and in any event their costs are no less an essential element in the "expenses of a religious institution." A statute which relieves the church of that substantial expense and transfers it to the public treasury cannot but have the effect of advancing religion.

## II

**The construction and application of the Act by the defendants-appellants renders it unconstitutional as violative of the Establishment Clause of the First Amendment.**

### A. Use of Statutory Funds Wholly for Religious Worship or Instruction

Section 3(5) of the Act defines a qualifying school as a nonprofit nonpublic school which provides instruction in the twelve common school subjects (arithmetic, reading, spelling, etc.). The defendants-appellants have interpreted this to mean that no other qualifications for participation in the benefits of the Act may be imposed, and have applied it accordingly. Thus, as we have noted in our Statement of the Case, they deem eligible for payments schools which impose religious restrictions on admissions, require attendance of pupils at religious exercises, require obedience by students to the doctrines and dogmas of a particular faith, are an integral part of the religious mission of the church sponsoring them, have as a substantial purpose the inculcation of religious values, impose religious restrictions on faculty appointments, and impose religious restrictions on what or how the faculty may teach.

These indicia of religiosity, which we presented to the defendants-appellants in item 7 of our Interrogatories, were not created by us out of whole cloth. They were culled from the various opinions in *Lemon, DiCenso* and *Tilton* and indicate the characteristics of institutions which as least a majority of the Court (and perhaps all) hold constitutionally ineligible to receive governmental grants, whether the institutions operate on the college or on the elementary and secondary level, and whether the grants are used for purposes which are instructional or non-instructional (e.g., construction of facilities). It follows that, whether or not the Act is unconstitutional on its face, there can be little doubt it is unconstitutional as interpreted by the defendants-appellants.

There is, however, another aspect of the defendants-appellants' administration of the Act which is even more flagrantly and unchallengeably violative of the Establishment Clause. As we have shown, the defendants-appellants consider it no concern of theirs as to how the beneficiary schools use the funds granted to them under the Act. The only reports they require of the schools are those showing (a) that the particular school is a qualifying one as defined in the Act, and (b) the number of students in regular attendance so that the proper allocation may be made to it. According to the defendants-appellants' construction and application of the Act, the schools may within the authority of the Act expend every dollar received from the State to pay for the indoctrination of the students in the Torah, catechism or the Thirty-nine Articles of Faith.

In *Tilton,* the Court ruled that public funds could not constitutionally be used to erect facilities in which sectarian

instruction would be conducted even after twenty years. In *Lemon,* it ruled that the funds could not be used to pay the salaries of even those teachers who teach secular subjects exclusively. How, then, can it be assumed that the Establishment Clause permits the state to finance purely religious instruction in nonpublic schools simply because the common branches of secular education are also taught there?

This fatal defect cannot be cured by change of position and procedure on the part of defendants-appellants and by their insistence that hereafter the schools report on the expenditures of the statutory funds received by them. Auditing of these reports on the part of the defendants-appellants would involve the State in exactly that entanglement which *DiCenso* forbids, as is evident from the following statement in the *DiCenso* opinion (403 U.S. at 620-21):

> There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education exceed the comparable figures for public schools. *In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures are attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.* It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" in *Walz*

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v. *Tax Commission, supra,* at 675, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses. (Emphasis added.)

**B. Use of Statutory Funds in Part for Religious Worship or Instruction**

We concede, of course, that State mandated services, i.e., those "provided for or required by law or regulation," cost money, and therefore it may be presumed that, although not required under the defendants-appellants' interpretation and administration of the Act (Exhibit G, p. ES 1.8), some of the statutory funds are used to pay for mandated services. What may surprise the Court, however, is how small a part of the funds are actually needed to cover the costs of mandated services.

Some six months after this suit was commenced, the New York State Education Department instituted a cost analysis for mandated services in some nonpublic schools. The report of that analysis is marked Exhibit D and was submitted by the defendants-appellants in response to Interrogatory 6 (App. 58a). The conclusion reached in that report, stated on page i thereof, is that "On the basis of the material herein presented, it is evident that the $28,000,000 apportioned amount specified within Chapter 138 of the Laws of 1970 is justified."

In advance of receiving the answers to the interrogatories we propounded to the defendants-appellants, we informed the District Court that we would accept those answers sight unseen as constituting a stipulation of facts (though, of course, not of conclusions) in this case. Yet we

cannot refrain from expressing some degree of reservation regarding Exhibit D. Included, for example, among costs properly attributed to mandated services are $10,000 to maintain the Mercy Convent and $7,000 for Sisters' transportation costs. (Mode I, pp. 16-17.)

But what is even more startling in the cost analysis is the finding that a teacher spends 52.4 instructional days a year in testing, plus another 10 days in what the analysis refers to as "mandated services" ("PEP, Attendance," etc.). (Exhibit D, Mode III, p. 2.) Since the normal school year (upon which Section 2 of the Act bases the formula for grants) is 180 days, this means that more than a third of a teacher's time in school is spent on non-teaching services

The only alternative to this otherwise shocking conclusion is that testing is part of the teaching process. With this we agree and will return to it shortly. Here we note only that apparently the State Board of Regents shared our reservations.

The consultant who estimated that 52.4 days were devoted to testing and 10 days to "mandated services" quite frankly, if perhaps unintentionally, recognized a distinction between internal testing and mandated services. (PEP, as we have noted above, is an external examination.) The Chairman of the Board of Regents apparently wanted more enlightenment on this and requested of the Education Department an analysis which would show how much of testing costs in the cost analysis (Exhibit D) reflected internal examinations and how much external testing. The response to the request is the very revealing Exhibit G to which we have previously referred in this Brief.

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Page ES 1.9 of Exhibit D takes as a typical example Catholic Central High School in Lansingburgh. The total testing and examination costs are estimated to be $68,853. As to this, the report says:

> Of the above testing and examination services, only the Regents Scholarship and January and June Examinations might be regarded as *specifically mandated.* Inclusion of such costs only would reduce the examination figure by $66,629. (Emphasis in original.)

Thus, the cost of specifically mandated testing and examination services is only $2,224. If we add to this the cost of specifically mandated non-testing services (e.g., attendance costs, pupil health records, etc.), which are set forth as totaling $15,180, we get the sum of $17,704 for all specifically mandated services. Even if "Kind and Benefit" and "Indirect Costs" are added, as the report does, the total amounts to only $24,674. "The apportionment to Catholic Central High School, consistent with Chapter 138," the report stated, "is estimated at $77,878."

*What this revealing report shows is that less than one-third of the State grant for mandated services is used for mandated services. The remainder becomes part of the school's general treasury and is used for its general purposes, including religious worship and instruction.*

The figures in respect to North Shore Hebrew Academy of Great Neck (p. ES 1.10), the other typical nonpublic school reported on, show practically identical results. The total amount to which the school is entitled under the Act is $5,400; the estimated costs of mandated services total $1,776, again less than a third.

The upshot of all this is that the only way that the nonpublic school costs can be reconciled with the statutory formula is by including within the concept of mandated services those connected with the formualtion and administration of internal tests such as teachers' and Diocesan examinations (which, of course, are not "provided for or required by law or regulation").

Before we address ourselves to this point, we add what we believe to be an important and indeed critical observation. Even if it be assumed that (a) the *in litem* cost analyses made by the defendants-appellants are completely valid, (b) all the schools benefiting under the Act would show a similar pattern of expenditures exceeding the statutory grants, and (c) the excess of costs over benefits is true today as when the analyses were made, the fact remains that there is and can be no assurance that this will always be so. Perhaps had this suit not been brought, the analysis would still have been made, but under the defendants-appellants' construction and application of the Act they are not required. Moreover, under their construction even if a future analyses were to show that the benefits exceed the costs, the schools would still be statutorily entitled to the full benefits.

In *Tilton,* the Court held a statute which allowed a building constructed even only partially with governmental funds to be used for sectarian instruction or religious worship after 20 years violated the Establishment Clause. There was no evidence in that case that the buildings would or were intended to be used for those purposes at the expiration of the period. It was sufficient, the Court held,

that under the statute the building *could* be used for those purposes.

This, we suggest, is no less true in the present case. Under the Act as construed by defendants-appellants if at any time, not 20 years hence but even next year or the year thereafter, benefits should exceed costs the excess could be used to finance sectarian instruction or religious worship.

**C. Testing as Teaching**

It is almost a truism in pedagogy that testing is an instrument of instruction. As one authority put it, "Examinations are part of the ancient heritage of education." Bebell, "The Evaluation We Have," in 1967 *Yearbook of Association for Supervision and Curriculum Development, National Education Association,* p. 30. See also, Tyler, Gagne and Scriver, *Perspectives of Curriculum Evolution,* 5-6 (1967).

Testing is not merely just another instrument but is a particularly effective instrument of instruction, as is evidenced by the fact that, under the name "catechism," it is the traditional method of religious instruction. Every teacher knows that students put most of their effort in studying for examinations, and that the secret of success in taking examinations is giving the teacher what the teacher wants. This is especially true in the area of religion as Thomas Jefferson implied some two hundred years ago. The civil magistrate, he said in the great Virginia Statute for Establishing Religious Freedom, who intrudes his powers into the field of opinion "will make his opinions the

rule of judgment and approve or condemn the sentiments of others only as they shall share or differ from his own * * *." (12 Hening, Virginia Statutes, 85.)

Is it likely that a student in the North Shore Hebrew Academy would give the same answer to a question on the origins of Christianity in a test formulated and graded by his teacher as he would give to the same question if he were a student in Catholic Central High School? Can it be assumed that a student in the latter school would give the same answer to a question on the Reformation as would be given by a student in a Lutheran high school?

It is in this respect, among others, that this case differs from *Everson.* In the former case what was financed was transportation on buses where normally religious instruction does not take place (actually, in that case the transportation was on public buses); if it did, constitutionality could hardly be upheld in view of *Tilton* and *McCollum.* In *Allen,* no funds were given to the schools; what was involved was the lending to parochial school children of publicly owned secular textbooks which were in use in the public schools. In neither case was entangling surveillance necessary to assure nonuse of public funds for sectarian instruction.

A perceptive article by Professor George R. La Noue of Teachers College, "Religious Schools and 'Secular' Subjects," appearing in the Summer 1962 issue of *Harvard Educational Review* (Vol. 32, pp. 272-275, 281), shows how tests in even so value-free a subject as arithmetic can be used for religious indoctrination. The following examples

come from three books published for use in church schools, two Catholic and one Protestant. (The books are: Sister M. Paulita Campbell, *Progress in Arithmetic, Grade 4* (1957); Sister Mary St. William, Sister Mary Emerentia, Sister Mary Florence, et al., *New Way in Numbers* (1961); Sidney Dystra, *Mathematics Curriculum Guide* (1958)):

How much money must I have to buy these four books? *Poems About the Christ Child,* $1.85; *Story of Our Lady,* $2.25; *Saint Joseph,* $1.05; *Saint Theresa,* $2.00.

The children of St. Francis School ransomed 125 pagan babies last year. This year they hope to increase this number by 20%. If they succeed, how many babies will they ransom this year?

David sells subscriptions to the *Catholic Digest* on a commission basis of 20%. If the subscription is $2.50 a year, what is David's commission on each sale?

China has a population of approximately 600,000,000. Through the efforts of missionaries 3,000,000 have been converted to Catholicism. What percentage of the people of China have been converted?

In Africa Father Murray, a Holy Ghost father, was given a triangular piece of ground upon which to build his church. What was the area of this ground if it had a base of 80 feet and an altitude of 120 feet?

* * *

Jim made the Way of the Cross. He likes the sixth station very much. What Roman numeral was written above it?

In millions of homes Our Lady's challenge has been accepted, but she wants billions throughout the world to join the Family Rosary for Peace. Do you know how to write in figures large numbers such as those just mentioned?

* * *

Why is it important to learn mathematics? Responses should relate to the idea that mathematics reveals God.

Why should a student's work be neat, accurate, and honest? Responses should relate to the idea that mathematics is a useful tool for work and service and must be done according to God's standards.

What would be the basis on which you would establish a business? Responses should relate to Christian ethics, stewardship, and usefulness.

How are number ideas used in making things? Responses should relate to mathematics as a tool for our creative activity.

How were mathematical ideas used in the creation of the world? Responses should relate to God the Creator and indicate the observation of form and order in creation.

Where does the idea of numbers come from? Responses should relate to God as the source of mathematical principles and of all knowledge.

What part did man play in revealing God through mathematics? Responses should deal with the history of the number system.

Mr. Justice White based his concurrence in *Lemon* on the fact that there the complaint alleged that the challenged statute "finances and participates in the blending of sectarian and secular instruction," and if proved "would establish financing of religious instruction by the State." (403 U.S. at 670-71). Do not these examples clearly show "the blending of sectarian and secular instruction?"

We do not know if these books are still in use in any church schools, or if they are whether any teachers use the suggested tests and the suggested answers. But this we submit is constitutionally irrelevant, as is clear from

the following quotation from the Court's opinion in *Di-Censo* (403 U.S. at 618-19):

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.
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> A comprehensive, discriminating, continuing state surveillance will inevitably be required to insure that these restrictions are obeyed and the First Amendment otherwise respected. • • • These prophylactic contracts will involve excessive and enduring entanglement between church and state.

This is exactly the situation in the present case. Even if it be assumed that a "comprehensive, discriminating, continuing state surveillance" would not be required in respect to external examinations such as those formulated by the State Board of Regents, the administration of these, as we have seen, makes up only a fraction of examination costs. Policing of teacher and Diocesan examinations is

impossible without involving that "excessive and enduring entanglement between church and state" which the First Amendment forbids.

## Conclusion

**There is no escape from the dilemma and no way in which the Act can be enforced without either subsidizing religious instruction or entangling the State in religion. In either event, the Act is unconstitutional under the Establishment Clause both on its face and as applied, and should be so held by this Court.**

Respectfully submitted,

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